

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF FLORIDA
3 CASE NO. 23-CV-21377-DPG

4 PRESIDENT DONALD J. TRUMP,) Pages 1-66
5 Plaintiff,) Miami, Florida
6 vs.) July 20, 2023
7 MICHAEL D. COHEN,)
8 Defendant.

9
10 TRANSCRIPT OF DISCOVERY HEARING
11 BEFORE THE HONORABLE EDWIN G. TORRES
12 U.S. MAGISTRATE JUDGE

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12:24PM

1 THE COURTROOM DEPUTY: The United States District Court
2 for the Southern District of Florida is now in session. The
3 Honorable Chief Magistrate Judge Edwin G. Torres presiding.

4 Calling case President Donald J. Trump vs. Michael D.
5 Cohen, Case No. 23-CV-21377-Judge Gayes.

6 Counsel, please state your appearances for the record,
7 starting with the plaintiff.

8 MR. BRITO: Good afternoon, Your Honor. Alejandro Brito
9 on behalf of plaintiff.

10 THE COURT: Good afternoon.

11 MR. BRITO: And, Your Honor, if I may, I have two interns
12 that wanted to come in. I just wanted to introduce them to the
13 court: Emily Garcia and Brianna Bartoo (phonetic).

14 THE COURT: Welcome. Thank you.

15 MR. BRODSKY: Good afternoon, Your Honor. Ben Brodsky on
16 behalf of the defendant. And with me today is Max Eichenblatt
17 from my firm.

18 THE COURT: Good afternoon. Everybody, have a seat. And
19 I believe we have somebody on the phone. Who's on the phone?

20 MS. PERRY: Good afternoon, Your Honor. This is Danya
21 Perry, from Perry Law in Manhattan. And with me is my colleague
22 Lilian Timmermann.

23 THE COURT: Very good. Good afternoon to you.

24 Okay. This is a discovery hearing in the case, I believe
25 requested by the defendant; correct?

12:25PM 1 MR. BRODSKY: I believe it was plaintiff that filed the
12:25PM 2 motion.

12:25PM 3 MR. BRITO: It was.

12:25PM 4 THE COURT: Oh, I'm sorry. Hold on. Let me pull up your
12:25PM 5 materials. Hold on. Hold on. Everything's all Willshire
12:25PM 6 (phonetic) in my folder right now.

12:25PM 7 Okay. Okay. Go ahead, Mr. Brito.

12:26PM 8 MR. BRITO: Thank you, Your Honor. May I proceed sitting
12:26PM 9 down?

12:26PM 10 THE COURT: Yeah, you can stay seated.

12:26PM 11 MR. BRITO: Thank you, Your Honor.

12:26PM 12 Your Honor, it's a fairly narrow issue that we're here
12:26PM 13 before the Court on in relation to plaintiff's request for the
12:26PM 14 entry of a confidentiality and protective order.

12:26PM 15 By way of background, this is a dispute between Mr. Trump
12:26PM 16 and his former attorney Michael Cohen. The claims, in a nutshell,
12:26PM 17 are that Mr. Cohen breached a written confidentiality agreement
12:26PM 18 that existed; and that in addition to breaching the
12:26PM 19 confidentiality that were exchanged during the employment
12:26PM 20 relationship, he also violated his attorney/client privilege by
12:26PM 21 disseminating information based upon the relationship between Mr.
12:26PM 22 Trump and Mr. Cohen.

12:26PM 23 Given the sensitivities of that case in and of itself, we
12:26PM 24 were hoping to enter into a confidentiality and protective order
12:26PM 25 with respect to the exchange of discovery materials.

1 Heightening the necessity for the plaintiff to request
2 that (unintelligible) is the identity of these parties. And
3 obviously if the two parties are media individuals, they are
4 people who the press wants to know information about, it's our
5 perspective that the defendant wants to conduct this discovery
6 process openly, and we are opposed to that; hence the reason why
7 we ask what we believe to be a relatively straightforward request
8 for the entry of a confidentiality and protective order, the terms
9 of which we -- we put to paper and transmitted it over to the
10 defendant for consideration. The defendant objects to the entry
11 of such a confidentiality and protective order, which would
12 essentially govern the discovery process, not only in terms of the
13 documents and any testimony.

14 I know I'm speaking to the Court about something that's
15 relatively rudimentary and the Court deals with these with some
16 regularity. I don't want to belabor them all because Your Honor's
17 written a couple of decisions that deal with it. But essentially
18 just from an overview, the cases that have come from the Southern
19 District of Florida really discover -- or discuss, pardon me, the
20 balance between the need for the public to have information
21 relative to cases balanced against the interests of the parties;
22 especially so when it relates to discovery because discovery
23 materials, as Your Honor has ruled in a couple of decisions, those
24 that we sent to the Court for consideration for purposes of this
25 hearing, expressly provide that discovery materials are not for

1 the public's consumption; and as a result, we would like the Court
2 to enter a confidentiality and protective order.

3 Underscoring even further the -- the reasons why we
4 believe it's -- it's more than appropriate to do so, putting aside
5 the issues, the facts of the case, the parties, is the fact that
6 there is an ongoing litigation that Mr. Cohen himself filed in
7 Supreme Court in New York against Mr. Trump with respect to the
8 payment of certain fees and identification agreements, so forth.

9 In that very litigation the parties entered into a
10 stipulation and an order for the production and exchange of
11 confidential information, essentially allowing for the designation
12 of both confidential and highly confidential documents, and -- and
13 designating them consistent with what we're asking the defendant,
14 Mr. Cohen, to agree to here, which he is not willing to do.

15 And so given the fact that the parties are already
16 proceeding, it would be standard and typical for a case such as
17 this, especially with the attention that could be drawn from it,
18 we would ask that the Court enter a -- or require the entry of a
19 confidentiality.

20 The final point, I don't want to talk about this simply
21 in a vacuum and -- and express concern about the possibility of
22 publicity over sensitive details. The Court need look no further
23 than the document request that the defendant served upon the
24 plaintiff here, where they ask for 69 categories of documents,
25 which would include Mr. Trump's tax returns, his financial records

1 for him and his organizations, communications between him and his
2 wife, communications relating to Stephanie Clifford -- otherwise
3 known publicly as Stormy Daniels -- and as well as other matters
4 that relate to ongoing litigations that Mr. Trump is currently
5 dealing with right now; specifically with the attorney general for
6 the State of New York, as well as a criminal matter that is also
7 in play.

8 For all of those reasons, we think it's -- it's
9 abundantly proper to the entry of a confidentiality order. And we
10 don't want to litigate this in the public. This is not for
11 public's consumption, and it should be resolved in court by the
12 parties through a cloak of -- of confidentiality as it relates to
13 discovery. Thank you, Your Honor.

14 THE COURT: Now, in your discussions with defendant's
15 counsel, was the issue about any particular aspect of your draft;
16 or was it any aspect of your draft?

17 MR. BRITO: It was a hard no.

18 THE COURT: As to any part?

19 MR. BRITO: It was simply: We're not willing to enter
20 into that. It's not that they agreed with or disagreed with
21 paragraph 4 or wanted to modify paragraph 7; they just were not
22 willing to enter into what we had proposed to them.

23 In the interest of candor, Judge, what I'd represent to
24 the Court with regard to the New York matter, I learned earlier
25 this week, I shared with counsel a couple of days ago I was aware

12:31PM 1 that the parties had entered into a similar agreement. It's not
12:31PM 2 included in your materials; hence the reason why I'm -- I want to
12:31PM 3 be transparent with the Court.

12:31PM 4 THE COURT: And how does -- and how does the --
12:31PM 5 How did your proposed order reconcile with that one?

12:31PM 6 MR. BRITO: The only different -- and I have a copy of it
12:31PM 7 here and I provided it to counsel -- the only material distinction
12:32PM 8 that I have seen, and I really didn't do the line-by-line
12:32PM 9 comparison -- but in the New York confidentiality there is a
12:32PM 10 designation between confidential and highly confidential. In the
12:32PM 11 one that we propose, it's confidential and highly
12:32PM 12 confidential/attorneys' eyes only.

12:32PM 13 That -- that -- I did not find attorney's eyes only -- an
12:32PM 14 attorney's eyes only designation in the New York version of the
12:32PM 15 agreement, but it was proposed in what I had sent to counsel. But
12:32PM 16 we never really got into whether that's even objectionable or not;
12:32PM 17 it was simply the concept was -- was not something they would have
12:32PM 18 agreed to.

12:32PM 19 THE COURT: Okay. Okay. Well, let me take a broader
12:32PM 20 question first, then we'll get into the mechanics of anything in
12:32PM 21 particular in response.

12:32PM 22 MR. BRODSKY: Thank you, Your Honor. May it please the
12:32PM 23 Court.

12:32PM 24 I want to start by noting that I have a slight
12:32PM 25 disagreement with the characterization of the confidentiality

1 order in the New York civil litigation. In fact, it's not between
2 the parties to this case. It's between Michael Cohen and Trump
3 Organization, LLC; not Mr. Trump individually.

4 And I would also note -- and also I'll circle back to
5 this shortly -- that the subject matter of Mr. Cohen's suit in the
6 New York State Court is a very narrow issue about unpaid legal
7 fees in contrast to this matter.

8 To Mr. Brito's point, this really is a unique situation.
9 And the question for the Court is: Can a defendant who has been
10 accused of serious misconduct, had very inflammatory allegations
11 leveled against him in a publicly filed and publicized complaint
12 and sued for \$500 million, which is the number stated in the
13 complaint, be restrained from speaking on the evidence that he
14 develops in his defense?

15 And can he be so retrained over his objection by the
16 plaintiff, Mr. Trump, who's a notorious litigant and perhaps the
17 most well-known person on the planet, who has invoked the Court's
18 jurisdiction, filed a very inflammatory lawsuit seeking
19 \$500 million from my client, put it all out in the public eye, and
20 then make a request to have the entire civil proceedings sealed.

21 And of course against this backdrop, Mr. Cohen's
22 resistance to the objection and the plaintiff himself opening the
23 courthouse doors, is the enormous public interest in this dispute
24 and its subject matter, which is a matter of grave concern to the
25 United States of America and, frankly, the entire world.

1 Against that backdrop, we start with the law on
2 confidentiality of court proceedings. It's the exception; not the
3 rule. And we're not in a situation where, for example, a media
4 outlet is seeking access to information that the parties have
5 agreed will remain confidential. To the contrary, one party who
6 has been involuntarily yanked into federal district court, is
7 being told that he must be muzzled in advocating and speaking on
8 the evidence he develops in his defense.

9 It is Mr. Trump's burden to show good cause. He has not
10 done so here. Your Honor's opinions on this issue cite the
11 Eleventh Circuit rule on good cause. It's a balancing test
12 between a litigant's interest in maintaining the confidentiality
13 of certain information, compared to all the other interests that
14 are on the table; the public interest and the private interest of
15 the counterparty litigant.

16 So the first factor which Mr. Brito has not addressed, is
17 whether allowing access would import -- impair court functions or
18 harm legitimate privacy interests. There has been no showing, not
19 in papers, not in the protective order that was submitted to the
20 Court, why court administration or Mr. Trump's legitimate privacy
21 interests justify putting a cloak of secrecy over these
22 proceedings.

23 Mr. Trump is not your average plaintiff. He's the
24 subject of many civil proceedings currently under indictment in
25 two separate jurisdictions, and shortly may be indictment -- may

1 be under indictment in two more. He is someone who has actively
2 sought out the public eye his entire adult life, and he has widely
3 publicized the subject matter of this lawsuit and it's well known.

4 The complaint cites 40-odd news articles in support of
5 its allegations; but it could have cited 4,000. The public's
6 appetite and interest -- legitimately so -- in the subject matter
7 of this case is enormous; and Mr. Trump has not shown why, having
8 walked into court, he can now say "I want it all to be private."

9 The second factor is the degree of and likelihood of
10 injury if made public. There is no one on earth perhaps whose
11 life is more public than Mr. Trump's. He's been involved in, by a
12 recent count, over 4,000 lawsuits in his life; and other than
13 embarrassment, which is not a reason to seal these proceedings, he
14 has no colorable injury if this matter becomes public. He's
15 already going to trial in a criminal prosecution on the very
16 subject matter of the allegations in this complaint in the State
17 of New York.

18 And, in fact, to that point, one of the major elements of
19 Mr. Trump's claim is that Michael Cohen breached his fiduciary
20 duty to him by disclosing information relating to Stormy Daniels.
21 The Stormy Daniels affair has been the subject of thousands of
22 news articles, prosecutions, and congressional hearings. It's the
23 subject matter of a pending indictment. And one may question the
24 wisdom of Mr. Trump coming to this court and filing a civil case
25 about the subject matter of his criminal indictment, but that's

1 not a good reason for him to seal off from the public view what he
2 says about that in support of his allegations that he voluntarily
3 and without coercion came before the Court raising.

4 The next factor goes to the reliability of information.
5 The information Mr. Trump seeks to protect is his own; the words
6 that come out of his mouth in deposition, the documents that he
7 produces from his own files. He cannot complain that there's
8 going to be unreliable information out there as a result of this,
9 because it's his own information.

10 Whether there will be an opportunity to respond to the
11 information is another factor. Mr. Trump has the biggest platform
12 on earth. If he wants to respond to the allegations, that's his
13 prerogative; but he's no David against a Goliath. He's not at
14 a -- at a disadvantage to rebut what he himself says.

15 And the last factor, Judge, is really the one that comes
16 into play here, which is whether the information concerns public
17 officials or public concerns. This is not a working day dispute
18 between a lawyer and a client. The former President of the United
19 States and the presumptive Republican presidential nominee, has
20 brought a lawsuit seeking \$500 million in damages against somebody
21 who is likely to be a significant witness against him in the
22 pending criminal prosecution in the State of New York, and the
23 whole world is watching.

24 And not only has he brought this suit without coercion,
25 he has stated in allegations, facts -- if you were to believe them

1 to be true -- that go squarely to those issues. He states in
2 paragraph 111: Plaintiff relied -- with respect to the Stormy
3 Daniels matter: Plaintiff relied on defendant's legal advice and
4 plaintiff acted out of a desire to protect his family from the
5 malicious and false claims made by Clifford.

6 The plaintiff could be our President again. If he has
7 said in a public filing "I did this only to protect my family, it
8 has nothing to do with my presidential campaign that I was running
9 at the time, and I only did it because Michael Cohen told me to",
10 the public has a right to know whether that is true or false and
11 make that determination on its own.

12 As to the availability of a less alternative to sealing
13 the documents, there are none. If Mr. Trump did not want to
14 disclose his tax returns, he did not have to make a claim for
15 economic damages in this case. But when a plaintiff makes an
16 allegation and seeks damages, the defendant has a right to know;
17 and in this case, the public has the right to know. If he doesn't
18 want that, then he can withdraw his claim for economic damages or,
19 better yet, he can dismiss this lawsuit altogether.

20 But we're not in an arbitral forum. We're sitting in a
21 public courtroom in the Southern District of Florida. He made
22 this choice to be here.

23 Going back to the confidentiality stipulation, I would
24 point out that, again, this is between separate parties, about
25 separate matter, far different than the one at issue here, and it

1 was entered first nearly four years ago. The world has changed a
2 lot in four years. Many, many things have happened.

3 THE COURT: And is it still in existence? In other
4 words, is it still ongoing and enforceable?

5 MR. BRODSKY: I believe the case is set to be tried
6 imminently.

7 THE COURT: And -- and that's pending in the state court
8 in New York?

9 MR. BRODSKY: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. BRODSKY: So we -- we would ask Your Honor to reject
12 and deny the motion for a protective order since the discovery
13 here doesn't concern trade secrets, doesn't concern anything
14 that's of particular commercial value, other than protecting,
15 perhaps, Mr. Trump's political interests or his liberty interests,
16 that justify imposing a protective order.

17 THE COURT: Now, following up on that point, the -- the
18 protective order at issue, the one that he circulated to you, does
19 it have --

20 My first question is: Does it have language in there
21 that's broader than what is normally entered in a -- in a
22 commercial dispute?

23 And, No. 2: Does it actually go as far as what you're
24 characterizing basically as -- as sealing the proceeding?

25 MR. BRODSKY: Well, first of all, by virtue of filing --

1 by the ability to designate any discovery as confidential
2 effectively does, because it seals off the subject matter of the
3 dispute itself. It goes further than your average confidentiality
4 order, because it has an attorney's eyes only provision, which
5 usually is reserved for instances where there are trade secrets
6 that are at issue; and if an opposing party got ahold of them,
7 then the cat would be out of the bag; not, you know, the situation
8 here.

9 But, you know, often parties to a commercial dispute will
10 not care if every document is marked confidential, because it's
11 not a matter of public concern and there's no great reputational
12 interests at risk like there are for my client. But the -- the --
13 so, therefore, the proceedings effectively become sealed because
14 the parties don't care. Here we do strongly care.

15 THE COURT: Now, with respect to the -- well, I guess --
16 I guess it somewhat goes to the scope, but ordinarily one -- one
17 issue that comes out in a confidentiality or protective order is
18 putting aside the designation of materials vis-a-vis the parties;
19 right? So to your point, the attorney's eyes only versus not,
20 putting that aside, the first question I have is: Is there any
21 basis to not grant relief with respect to disclosing confidential
22 documents to third parties?

23 We're not talking testimony or anything like that; just
24 simply taking a document that's produced in discovery and being
25 able to give it to whoever you want, why is that not a reasonable

1 request?

2 MR. BRODSKY: Well, because here Mr. Cohen wants to be
3 able to do that and should be able to do that, because he has been
4 accused and, frankly, slandered in this complaint across over 150
5 allegations, and there is nothing that's going to be confidential
6 that's produced because the plaintiff has put it all at issue.
7 We're not the plaintiff seeking to poke around at the edges of
8 somebody's trade secret claim or patent infringement claim where,
9 in addition to the issues, there may be a lot of sensitive
10 business information that's disclosed that the plaintiff -- that
11 the plaintiff should not be entitled to see. We're the defendant.
12 The plaintiff has come in and put all of this into the public
13 record. You know, there's not a legitimate claim that they want
14 to maintain confidentiality over the subject matter of their
15 allegations when they put it all in the public eye.

16 THE COURT: Okay. And in -- well, I'm trying to envision
17 -- well, let me ask you this question as a practical matter. Your
18 point in part is, of course, so much of what's at issue in this
19 case is already public anyway, so even if you entered into a
20 confidentiality order, it probably wouldn't satisfy the basis, the
21 principle of the order; because if it's already public, then by
22 definition it can't be confidential.

23 MR. BRODSKY: That's true.

24 THE COURT: But I suppose what -- what nonpublic
25 information could come out in a case like this realistically?

1 Obviously, tax returns. But they've already been
2 publicized; right? But what about, for example -- I'll give you
3 an example. What about a private, you know, financial statements
4 of either -- either Mr. Trump or his -- his business, which would
5 not necessarily have been publicly disclosed; what if something
6 like that was something you requested in discovery. Why couldn't
7 he maintain that confidential?

8 MR. BRODSKY: Well, a couple of reasons.

9 One, I think that by putting it at issue, he has waived
10 his confidentiality. He has said: I've suffered an enormous --
11 hundreds of millions of dollars of damages, including economic
12 damages, so he's put it at issue. He's not a defendant in a
13 punitive damages suit who doesn't want to turn over his personal
14 financial statements and have them publicized. He has said:
15 These are my damages. I have been harmed, so that's first and
16 foremost.

17 Second of all, even if you were to ascribe some interest
18 and privacy in that, query whether the President of the United
19 States -- you know, the former President and the presumptive
20 Republican nominee, even has such a privacy interest in his
21 personal financial information, the numerous other factors which
22 basically weigh down the scale in favor of disclosure say this is
23 a case where, in fact, it should not apply.

24 You know, this isn't Michael Cohen attempting to use the
25 federal judicial system for his advantage for a fishing

1 expedition. I'm -- I'm certain he'd love if this case were
2 dismissed. But at this point, having been accused and having this
3 huge damages threat hanging over his head, he frankly has -- I
4 believe he has the right to defend himself in the public eye.

5 THE COURT: Now, let me ask you this question on that
6 point too. Say that the Court entered a protective order that
7 precluded certain materials to be turned over and directly to a
8 third party, I mean let's say that was the extent of the order,
9 how would that prevent Mr. Cohen from doing what you just said he
10 wants to do?

11 MR. BRODSKY: Your Honor, if you were to say, for
12 example, financial information, you know, without further order of
13 the Court would be -- could be marked confidential, I don't think
14 we would oppose that.

15 THE COURT: All right. All right. So maybe the problem
16 is -- well, let me --

17 Actually before I get there, let me go back to you, Mr.
18 Brito, and have you respond to the broader point he is making;
19 which is in the nature of this case, unlike the average case --
20 the average case being somebody sues for damages of a -- of a --
21 of a big-money defendant and then wants a whole slew of financial
22 discovery, and the big-money defendant is the one who's seeking a
23 confidentiality order because they didn't bring a lawsuit, number
24 one; and, number two, they have a lot of financial materials and
25 trade secret information that they don't want disclosed just

1 because they've been sued.

2 And so his argument is that this is a different boat
3 because the plaintiff is raising a very public lawsuit, and then
4 it's the plaintiff who wants everything protected.

5 MR. BRITO: I think we have to take into consideration:
6 What is the nature of this case? This is not a competitor suing a
7 competitor. This -- and I heard counsel's talk about the fact
8 that my client filed this suit without coercion. I'm not sure
9 I've ever encountered a litigant who filed a lawsuit under
10 coercion. I think litigants file a lawsuit because they feel they
11 have no other choice but to do so. And in this instance, you have
12 a client -- I'm sorry. I'm sorry -- you have a client suing his
13 former attorney for disclosing confidences. That's the answer to
14 Your Honor's question in a nutshell, because it -- it really
15 belies the arguments that I heard from counsel with respect to:
16 Well, Mr. Trump voluntarily filed this lawsuit without coercion.
17 He did file this lawsuit against his former attorney for writing
18 books and -- and speaking to anyone who would listen on any forum
19 possible about the relationship that he had with his client and
20 information that was imparted to him by his client, in violation
21 not only of his ethical obligations but a written confidentiality
22 agreement.

23 He also agreed by virtue of the confidentiality agreement
24 that he signed when he started his relationship to maintain this
25 information confidential. He violated that grossly by writing two

1 books, having podcasts, and -- and being on -- on every news
2 channel that would have him where he would disclose more and more
3 information that he was not entitled to do, and now he's coming
4 before the Court and asking the Court: Allow me to continue to do
5 this, number one.

6 And number two: Allow me to ask the plaintiff in this
7 case to divulge such things, Your Honor, as in the document
8 request -- because we're not dealing with this in a vacuum -- all
9 contract agreements or other documents from 2006 until the present
10 reflecting the existence of an attorney-client or employment
11 relationship between Mr. Cohen and Mr. Trump.

12 That is going to invite, if we read the letter of the
13 request, a production of a vast array of documents; not all of
14 which are public, not all of which are in the books, but would be
15 responsive as this -- this one request, and there are several that
16 are similar in breadth of what it is that's being asked of my
17 client.

18 They're -- they're turning this on its head, Your Honor,
19 with respect to the fact that the public has a concern over the
20 resolution of this dispute, and that Mr. Trump put this claim at
21 issue. Your Honor, he did so; and the reason why he did so is
22 because there was a violation of the confidentiality that we're
23 simply seeking to maintain. It's irrelevant to --

24 THE COURT: The problem is -- the problem -- I hear what
25 you're saying. The problem is that, you know, if he were seeking,

1 for example, an injunction that stopped him from violating, you
2 know, or talking to somebody or disclosing, then that -- that
3 would be one thing.

4 He's seeking money damages for the -- for what he
5 believes is a breach of fiduciary duty; right?

6 MR. BRITO: Right.

7 THE COURT: And so -- and to some extent, from his
8 perspective, right, the damage was done when the disclosures were
9 made. It's in the public domain. So now even -- even in the
10 example that you just gave me, a document evidencing the existence
11 of a -- of a -- of an attorney-client relationship, right, in and
12 of itself, of course, that's not privileged; right? Unless -- I
13 mean there's a lot of law that says a retainer agreement, for
14 instance, is not privileged. And that's going to be an exhibit in
15 a case; correct?

16 MR. BRITO: It -- well, there's not an engagement letter;
17 there's a confidentiality agreement and there's going to be
18 invoices and there's going to be a series of documents --

19 THE COURT: Right.

20 MR. BRITO: -- that will be exhibits. I -- I'm not that
21 far down the road towards dealing with trial exhibits.

22 THE COURT: Right.

23 MR. BRITO: I'm simply talking about discovery and
24 avoiding this from becoming -- and I don't mean this in a
25 disparaging way to anyone -- I don't want this to become a circus

1 from the standpoint of a -- a series of documents that would
2 reflect the -- the relationship; not necessarily the formation of
3 it, as Your Honor is focusing on with regard to the engagement
4 letter, but the existence of a relationship. That could be
5 broadly read by virtue of the definitions provided to discuss
6 anything that was shared between attorney and client that may not
7 have found its way onto a book, that may not have found its way
8 onto a podcast that is not publicly disclosed. They're not asking
9 for simply "Give us documents relating to the claims." They want
10 to open up the entire relationship from 2006, 17 years of a
11 relationship that they want to make public to the world, when it
12 was, by its nature, it was a privileged relationship, it was an
13 attorney-client relationship, it was a confidential employer
14 relationship. And we're just simply seeking to extend what Mr.
15 Cohen signed; not only in his relationship with the plaintiff, Mr.
16 Trump, but what he and his counsel agreed to in New York with
17 respect to the Trump Organization. We could dance on that head
18 and try to make the distinction between Mr. Trump and the Trump
19 Organization as being two different parties; but at the end of the
20 day, Mr. Cohen remains the same. Mr. Cohen agreed to have a
21 confidential document in a case where he is the plaintiff. In the
22 New York action, he's the plaintiff, and in that case those
23 documents are confidential, and he gets the benefit of that
24 confidentiality, despite his role there.

25 THE COURT: Who is the one who wanted the confidentiality

1 agreement in New York? Do you know?

2 MR. BRITO: I don't.

3 THE COURT: You just found out about it.

4 MR. BRITO: I just found out about it, but I did ask the
5 question: Was it done over objection? My understanding is it was
6 done by agreement of the parties.

7 THE COURT: Okay.

8 MR. BRITO: And so who was the initiator? I can't speak
9 to that. I can certainly find out. But at the end of the day, it
10 was agreed to by Mr. Cohen and his attorneys, but yet now he
11 doesn't want to agree to it, but I think that's for reasons that
12 I -- I appreciate counsel's argument, but I don't think that's the
13 reason why Mr. Cohen really wants to publicize anything and
14 everything. And I -- I understand what the Court's asking me
15 about in terms of: Well, when we go to trial, how are we going to
16 deal with the logistics of documents that are being designated as
17 confidential? I'm not -- that's for another day. I'm talking
18 about right now so that, number one, we can deal with not only the
19 document production, but the first thing that they asked us for
20 once we once we had our Rule 16 conference: We want to take Mr.
21 Trump's deposition yesterday. That's fine. We'll -- we'll make
22 Mr. Trump available for deposition. But for a variety of reasons,
23 it's not something that we want on TMZ or any other media network
24 and now all of a sudden that deposition is videotaped and
25 publicized when in no other has his deposition -- or in limited

1 instances have the depositions been made public because of the
2 nature of the subject matter.

3 It's fine that Mr. Trump is the former President of the
4 United States, it's fine that he is the presumptive candidate.
5 But what we're talking about is a client suing -- the client suing
6 his attorney for divulging information, and the attorney's
7 response to that is: I want to reveal it all.

8 And counsel said that Mr. Trump is not your average
9 litigant. I couldn't agree more. I don't think anybody would
10 disagree with that statement. And he is unique by virtue of his
11 standing, but that doesn't negate his right to privacy in
12 relationship to the statements he made to his counsel. And the
13 fact that --

14 THE COURT: Then why -- I hear what you're saying on
15 that, but I guess the other problem is that you have the legal
16 issue is whether there is good cause to do this; right?

17 MR. BRITO: And I can go through the elements, but again,
18 I didn't want to belabor them because I know Your Honor has
19 authored enough to understand what those elements are.

20 THE COURT: No, I hear you. So there's that issue as to
21 whether the cause can be established in the case; but put that
22 aside for the moment.

23 I suppose one of the -- one of the points you're making
24 and one of the strongest arguments that you have is that given the
25 nature of the case, he's seeking essentially to enforce the

1 privilege that he was entitled to from his point of view.

2 MR. BRITO: Correct.

3 THE COURT: And -- and so he doesn't want -- and so by --
4 by enforcing it, he doesn't then want to open up an avenue for the
5 defendant or anybody associated with the defendant to then do
6 further disclosures that the plaintiff deems to be privileged;
7 right?

8 MR. BRITO: Correct.

9 THE COURT: Broadening the harm that he is alleging
10 occurred?

11 MR. BRITO: Correct. And there's no -- there's no
12 countervailing interests in relation to the Court's good cause
13 analysis that could be articulated by Mr. Cohen as to why he can't
14 receive these documents under the auspices of his confidentiality
15 order and not reveal it to the public.

16 THE COURT: Right.

17 MR. BRITO: With regard to the attorney's eyes only, the
18 reason why we injected that in there, Your Honor, is because
19 you -- you were -- you were (unintelligible) in your comment about
20 the scope of the request. And request No. 66 in their document
21 request seeks: all financial statements reflecting your assets
22 and liabilities from January 2016 to the present. Category 68 is:
23 all spreadsheets, memoranda, financial statements, and other
24 documents containing any analysis or calculation of the value of
25 the Trump brand, including calculation of goodwill to the Trump

organization.

THE COURT: The problem though with that argument is since he was his lawyer for a good chunk of time, he's already -- he's already privy to all that. He could recall, without me entering any order, he could go in front of a microphone and say: This is what I remember he was worth on that particular time period.

MR. BRITO: Up until a point. His relationship ceased to exist by virtue of the fact that he no longer represented Mr. Trump, he was indicted, he was sent to the federal penitentiary for his unlawful conduct. And during that period of time when he was not the President's attorney, he is not entitled to see all of this financial that he would not otherwise see, but for the fact that he -- and I'm really assuming, just for purposes of answering Your Honor's question -- that even during the time he was the attorney he would have seen this information, which I'm not so sure, but that's a separate point.

I don't think that the scope of his representation was such that it would capture all of his financial information. I think his role was far more limited, far more nuanced than simply serving in the capacity as general counsel, because I know that Mr. Trump has a general counsel that has represented him for a vast period of time, during the time that Mr. Cohen was there and through the present. That individual would probably be privy to a lot more information than Mr. Cohen. Mr. Cohen wasn't the do-all

1 be-all attorney for Mr. Trump.

2 But I appreciate what Your Honor's saying; he might have
3 had the right to see some aspects of the financial discovery to a
4 point. And then when he ceases being a lawyer, he's not entitled
5 to that, and so we don't think he should be entitled to see that
6 under a going forward basis under this demand, Your Honor. As I
7 mentioned, he's violated his -- his ethical violations plainly and
8 he's breached the confidentiality agreement that he signed,
9 plainly. I have zero confidence that this gentleman is going to
10 abide by a confidentiality that's in place in this case, I just
11 don't, unfortunately.

12 I -- obviously I appreciate the Court's involvement in
13 the event that that would happen. But the concern is: Once the
14 cat's out of the bag, that's a problem for -- for any party that
15 wants to protect a privileged communication, especially, as noted
16 by counsel, somebody who's right now looking at two federal
17 indictments. And we have to -- we have to keep that in mind as
18 well, Your Honor, to the extent that Mr. Cohen wants to publicize
19 information. And it's not that we're hiding information that's
20 relative to a criminal indictment, but certainly it's going to be
21 fodder for whatever it is that's taking place in other courtrooms.
22 But with respect to those, I think we have to be mindful of the
23 fact that there are those proceedings taking place and there are
24 rules that govern that. I -- I don't pretend to. I've never
25 practiced criminal defense in my life and I won't, but --

01:08PM 1 THE COURT: Another problem with that is that
01:08PM 2 technically, I guess, Mr. Cohen is a witness at least to one of
01:08PM 3 those proceedings; right?

01:08PM 4 MR. BRITO: I -- I would presume as much. I -- I don't
01:08PM 5 have access to the witness list; and again, I don't get involved
01:08PM 6 in cases I know nothing about, such as criminal matters --

01:08PM 7 THE COURT: Right.

01:08PM 8 MR. BRITO: -- but I would presume you're right.

01:08PM 9 THE COURT: And so then I can't enter an order, for
01:08PM 10 example -- and that's the reason that it's difficult, it's not so
01:08PM 11 simple, because, for example, in that case I can't enter an order
01:08PM 12 that precludes him from testifying as to anything that he has
01:08PM 13 learned in connection with that proceeding; right?

01:08PM 14 Theoretically something here could; right? I mean, there
01:08PM 15 is some overlap between the allegations in this complaint and the
01:08PM 16 New York proceeding; is there not?

01:08PM 17 MR. BRITO: I -- I'm sure that there's some. There's got
01:08PM 18 to be some component. I can't speak to the depth of that
01:08PM 19 component --

01:08PM 20 THE COURT: Right.

01:08PM 21 MR. BRITO: -- certainly, and that has to be a factor
01:08PM 22 here. And I don't think that factor is simply allowing Mr. -- Mr.
01:09PM 23 Cohen to have full access and full ability to disclose. I don't
01:09PM 24 think that that's the rational response to the problem that Your
01:09PM 25 Honor's highlighting.

1 I think to a certain extent -- and we haven't really
2 discussed this amongst each other -- but there may be a scenario
3 whereby there may be a staggered discovery process that may need
4 to be employed until such time as Mr. Cohen testifies, because his
5 testimony, to the extent he's going to be called as a witness, is
6 framed based upon his knowledge and his knowledge as he has it
7 today; not his knowledge as he's acquired it from discovery that
8 he wasn't otherwise aware of, if he were to testify tomorrow, he
9 would have to testify based on what he knows as of that moment.
10 If he testifies six months from now after we've exchanged
11 discovery, he's going to say: Well, now not only do I know this
12 but I also know the following because of the discovery that --
13 that we got in my case. And I'm sensitive to that, and maybe it
14 needs to be compartmentalized in terms of what discovery is fair
15 play now as it relates to the allegations of the complaint; and
16 then everything else that I don't think relates to the allegations
17 of the complaint and that they're seeking information on, which
18 may have, as we talked about, some depth in the criminal
19 proceedings.

20 But I -- I think they are apples and oranges to a great
21 extent. There is obviously some overlap. We can deal with the
22 overlap, but I think we should segregate the discovery that's
23 being sought by the claims, make it subject to a confidential
24 disclosure; not because we don't want the defendant to defend
25 himself. He'll have access to the information that he's

1 requested; just don't publicize it. Because there is, as Your
2 Honor's orders state, discovery doesn't share the same benefit.
3 Discovery materials do not share the same benefit to public access
4 as filings do. And so the -- the discovery process doesn't need
5 to be measured by the good cause standard; it's discovery. It's
6 not something subject -- it's not subject to public consumption.
7 That's really what we're talking about right now.

8 We're probably going to be back before you at a later
9 date when -- to the extent that there needs to be a trial in this
10 case and to the extent it goes forward, we'll have that
11 conversation then to the extent that there's filings that are
12 going to be made.

13 Right now what's at issue before the Court is the
14 defendant's motion to dismiss the complaint and that's been fully
15 briefed and we'll deal with that. I don't foresee a lot more
16 filings down the pike that would warrant the disclosure of any of
17 this confidential information. And to the extent that that
18 happens, file it under the confidential rules that exist. To the
19 extent that they challenge the confidentiality agreement,
20 certainly they can come behalf the Court and say that, you know,
21 we're taking it too far.

22 But we should honor and protect a client and the
23 information that the client imparted to the attorney and not now
24 make it for public consumption because at its core, the reason why
25 we're here is because the defendant did exactly that to begin

1 with. He made confidential information and privileged information
2 and untruthful information subject to public consumption. And
3 we -- we don't want that to continue, because we want to right the
4 wrong that occurred by virtue of the defendant's disclosure, and
5 an additional disclosure is simply not going to accomplish that.

6 We're not seeking an injunction because the events
7 happened in a way that it wasn't in the plaintiff's best interest
8 to move forward with an injunction because that would have not
9 volunteered a lot of information to the public eye, we're simply
10 seeking a suit for monetary damages that should take its course
11 but it should be done through confidentiality, which happens just
12 about every day in every courthouse with respect to protecting the
13 parties' interests; especially in this one, especially because of
14 the parties, and especially because of the fact that we're talking
15 about an attorney-client privilege relationship, Your Honor.

16 THE COURT: Then the other question I have though is in
17 terms of policing it, there's -- assuming we entered into one, in
18 many respects there's going to be a big fight as to whether or not
19 anything is actually confidential because so much is -- is
20 publicly disclosed or known, either about the incidents involving
21 New York, involving a whole slew of things. And so then it can't
22 be confidential now if it's already in the public domain; so how
23 am I going to police that?

24 MR. BRITO: Well, there's -- the two things.

25 Number one, again, I want to highlight and inject facts

1 into our conversation so that we really look at this, as I
2 mentioned earlier, one of the requests is: Give us all
3 communication between you and Melania Trump. There's no way,
4 shape, or form that any of that would ever be public. Now,
5 there's written communications between husband and wife with
6 respect to a third party, that's just so far out of bounds in
7 relation to what this case is about that it would be
8 objectionable. But it goes to the point of: What is it that Mr.
9 Cohen is trying to accomplish here? He's not trying to serve a
10 public interest, he's not trying to serve a private interest, he's
11 trying to raise a scandal, and he wants to disclose as much as he
12 can about his adversary in a way that simply demeans him in
13 public. It doesn't serve the purpose of this case. That's the
14 more specific point.

15 The more general point to Your Honor's question is by
16 virtue of the fact that there is a written communication that
17 talks about a subject, and in that subject there is a line that
18 has information that has already been public, that does not negate
19 the privacy of the balance of the document. And so it would have
20 to be done, to the extent that there is going to be that fight
21 that Your Honor's forecasting that may happen, is: Is the
22 document itself public, or is a part of it public?

23 If a part of it is not public and part of it is, the
24 whole document is subject to -- to confidentiality. And we're
25 talking about, again, the former President of the United States.

01:16PM 1 The documents that have been requested here, and the -- the good
01:16PM 2 faith conference that we had with respect to our responses when we
01:16PM 3 told him some of the responses to these requests was that they
01:16PM 4 want us to broaden the scope and now we need to ask other
01:16PM 5 agencies, representatives, entities, that's going to comprise the,
01:16PM 6 quote/unquote, you in this request that we're being asked to
01:16PM 7 provide. That, again, in itself is now going to essentially
01:16PM 8 require us to dig into a certain level of governmental
01:16PM 9 documentation, which I'm not prepared to get into because it has
01:16PM 10 nothing to do with this litigation.

01:16PM 11 But the request is such that they want us to broaden the
01:16PM 12 scope and -- and look back to when Mr. Trump was the President.
01:16PM 13 And are we talking about now governmental files that need to be
01:16PM 14 disclosed? And how do we even manage to deal with classified
01:16PM 15 information or confidential information?

01:16PM 16 THE COURT: Well, he's not supposed to have that anyway.

01:17PM 17 MR. BRITO: I understand.

01:17PM 18 THE COURT: In other words, the answer would be none;
01:17PM 19 right?

01:17PM 20 MR. BRITO: That's what we said. And they said
01:17PM 21 (unintelligible) because you should broaden the scope to add a
01:17PM 22 variety of -- and I appreciate we're not talking about the other
01:17PM 23 litigation --

01:17PM 24 THE COURT: Right.

01:17PM 25 MR. BRITO: -- in the west coast of Florida, but they say

1 broaden the scope because we did say no, and they didn't like that
2 response, and so I'm concerned about how far are we going with
3 this.

4 THE COURT: But the solution to -- I hear your point.
5 The solution for that is properly scoped out discovery, which
6 obviously you're entitled to -- to litigate. But that doesn't
7 necessarily answer the question of -- of the effect of a
8 confidentiality order in a case like this, which is so very
9 public. But it's hard to enforce a confidentiality order like
10 that in many respects because so much of it is public.

11 So then, in other words, that's the problem that I have
12 in this case, which is unusual, because in most litigation the
13 public doesn't have this swath of information about a subject well
14 in advance; right? And so here -- and so, therefore, entering
15 into a confidentiality order and enforcing it is a much easier
16 thing, but here it's a little more complicated.

17 MR. BRITO: But that's why I'm suggesting it needs to be
18 done on a document-by-document basis, which it would be done
19 otherwise in any situation. And simply because if there was a
20 document --

21 THE COURT: The problem in your draft is -- and -- and I
22 -- to some extent maybe I agree with you. But the problem with
23 your existing draft that you have is that it basically, as is true
24 in many -- much litigation, it puts the presumption of
25 confidentiality up front, and basically requires the nonmovant --

1 rather the -- not the nonmovant, the other side to challenge it;
2 and here I don't know if that presumption should apply. That's
3 the problem, because otherwise -- because -- because there are
4 going to be far more fights about that, and what we're going to be
5 dealing with is, is this a confidential document or not, if the
6 presumption is that everything is confidential. That's one
7 concern I have about whether this case is different.

8 And perhaps if you change that presumption, so put the
9 onus on you as the party -- where a party is seeking to protect
10 the information to obtain confidentiality, then maybe that's the
11 better thing to do. Do you see what I'm saying?

12 MR. BRITO: I -- I do.

13 THE COURT: So, for example, you raised -- and you
14 raised a compelling argument with respect to documents that you
15 consider to be to this day privileged, they've not been disclosed;
16 right? They are subject to attorney-client privilege. They were
17 communications to and from a privileged group; right? And -- and
18 that document -- the defendant seeks that document in -- in
19 production, and one of the arguments you're making is that has to
20 do with the entire purpose of the lawsuit: We're trying to
21 enforce my client's rights to have privileged communications with
22 the lawyer that you're alleging he violated; right?

23 MR. BRITO: Uh-huh.

24 THE COURT: So that is very -- that type of document I
25 can enforce readily; right? Because you can declare something

1 privileged, and the presumption at that point goes to the
2 privilege holder; right?

3 So that category I think of what you're talking about I
4 think I could deal with and should deal with, frankly, because
5 it's -- it's -- your client is claiming that it's a privileged
6 communication. And the whole relationship between the plaintiff
7 and the defendant here was for a great degree of time a privileged
8 environment; right? Because he was a lawyer; plaintiff was the
9 client; right?

10 MR. BRITO: Uh-huh.

11 THE COURT: So you see if I'm looking at it as a
12 privilege, that I think we can do. That's much easier to do, and
13 maybe, you know, maybe I should definitely -- we should definitely
14 focus on that first because that is something I think could be
15 readily enforced.

16 Once you -- once you start going beyond that, that's when
17 it becomes more difficult.

18 MR. BRITO: And when we go beyond that, I think not only
19 do we go beyond that in terms of the difficulties Your Honor is
20 envisioning, but I think we only go beyond that because the
21 requests go beyond the claims and the defenses in the case.

22 THE COURT: And of course --

23 MR. BRITO: And we'll deal with it then, agreed.

24 THE COURT: Obviously off the top of my head, I don't
25 know that any communication between the plaintiff and his current

01:22PM 1 wife matters, but maybe they do, I don't know. On the face of it
01:22PM 2 you raise a good point; an overbroad -- remedy for an overbroad
01:23PM 3 request is -- is to deny a motion to compel; right?

01:23PM 4 MR. BRITO: Right. But I think despite I think the fight
01:23PM 5 that you're envisioning happening, which is -- is potential, I
01:23PM 6 think is worth the trouble of having. I'm prepared to engage in
01:23PM 7 that, quote/unquote, fight --

01:23PM 8 THE COURT: Right.

01:23PM 9 MR. BRITO: -- because of the privacy interests that
01:23PM 10 we're trying to protect.

01:23PM 11 THE COURT: Right.

01:23PM 12 MR. BRITO: It's critical.

01:23PM 13 THE COURT: I think that -- I think I could do that, and
01:23PM 14 I think I -- I could see, you know, your argument is they're
01:23PM 15 privileged communications that remain and that should be enforced,
01:23PM 16 I think that I can do, and the presumption would be with the
01:23PM 17 privilege holder, that one category.

01:23PM 18 But the way your draft now is, it presumes everything at
01:23PM 19 that point, as is traditional. Your draft is a traditional
01:23PM 20 confidentiality agreement that I enter all the time. The problem
01:23PM 21 is that taking into account the defendant's position and the
01:23PM 22 enforceability of this. That's the other thing: I don't want to
01:23PM 23 enter an order that just becomes, you know, an unenforceable
01:24PM 24 document because it becomes -- it becomes unwieldy in terms of how
01:24PM 25 many things are going to be in issue.

01:24PM 1 One of the issues -- one of the concerns that I have is
01:24PM 2 maybe -- maybe the way to do this is at the very least, even if I
01:24PM 3 agree with you that we have to come up with some way to protect
01:24PM 4 someone from abusing litigation, just to scandalize, on the other
01:24PM 5 hand, the presumption for that may have to be on you; you being --
01:24PM 6 not you personally, I mean on the plaintiff --

01:24PM 7 MR. BRITO: I understand.

01:24PM 8 THE COURT: -- as opposed to the defendant.

01:24PM 9 MR. BRITO: I understand what Your Honor is suggesting,
01:24PM 10 and I think that that would be acceptable. I would invite the
01:24PM 11 Court to -- to modify the confidentiality as you think it's the
01:24PM 12 best to fit the circumstances, of course.

01:24PM 13 But again, if we drill down on what it is that the claims
01:24PM 14 are focused upon, in terms of the disclosure of information by
01:24PM 15 client to attorney, the presumption that there will be other
01:25PM 16 communications, or that there were communications between client
01:25PM 17 and attorney that are already public, I don't think that that's --
01:25PM 18 I don't think that that's going to be something that is going to
01:25PM 19 be all that prevalent in this case. I don't think we're going to
01:25PM 20 find that there was communication between these two individuals
01:25PM 21 that have already reached the hands of the media. They should not
01:25PM 22 have. They should have remained privileged and confidential.

01:25PM 23 And the concern that I have is, again, if in fact the
01:25PM 24 media has obtained information that was supposed to have been made
01:25PM 25 privileged or maintained as privileged was disclosed by the

01:25PM 1 recipient, i.e., the attorney, without authorization, and now
01:25PM 2 we're going to endorse the repeated disclosure of information --
01:25PM 3 that maybe is not exactly my point, but gives context because
01:25PM 4 that's probably what we're going to hear, is that: Judge, we
01:25PM 5 should be entitled to the following documents because it discusses
01:26PM 6 this topic, which is one of the topics that Mr. Cohen raised in
01:26PM 7 his book or one of his two books, and so we should be able to get
01:26PM 8 all of this communication without it being deemed confidential
01:26PM 9 about communications regarding this subject matter because he's
01:26PM 10 already disclosed the subject matter, that now we're just feeding
01:26PM 11 the unlawfulness of Mr. Cohen's conduct by giving context to a
01:26PM 12 statement, which is not what my client wants to happen.

01:26PM 13 My client wants -- to the extent that they want
01:26PM 14 information about what it is that was disclosed and whether that
01:26PM 15 was confidential or privileged information, we'll provide it to
01:26PM 16 them and them only; but that doesn't mean that now everybody gets
01:26PM 17 to understand the totality of the circumstances to prove whether
01:26PM 18 the statement was false or true or unlawfully disclosed. That's
01:26PM 19 for trial. For discovery that shouldn't be consumed by the
01:26PM 20 public, and that's the fight that I think Your Honor's probably
01:26PM 21 envisioning because they're going to say: Well, this is subject
01:26PM 22 matter -- and I don't want to pick one because I don't want to
01:27PM 23 highlight any one because there are several that are raised in Mr.
01:27PM 24 Cohen's book, he's already talked about that topic. Okay, fine.
01:27PM 25 Talking about a topic is different than, going back to my analogy,

1 it's one line in a multipage e-mail, that doesn't mean that the
2 multipage e-mail gets disclosed or is deemed lacking in
3 confidentiality just because the subject matter has been out
4 there. That should remain confidential. He disclosed a topic
5 about this e-mail, but the e-mail itself should not be subject to
6 to production publicly. It should still be maintained
7 confidential; that's the point I'm trying to make, and that's the
8 fight that I think we probably end up having and Your Honor is
9 envisioning taking place.

10 But I just wanted to make that distinction, because I
11 think if we were talking about the fact that Mr. Cohen's
12 disclosures he showed a memo that he wasn't supposed to, and now
13 that memo in its entirety is publicly consumed and disclosed,
14 that's -- that would be an argument, but that's not what happened
15 here. He talked about snippets, events, conversations. And those
16 -- the snippets, events, and conversations are going to be
17 memorialized in a variety of different documents that we don't
18 want the public to have access to until we have to try this case.

19 THE COURT: Okay. Your response.

20 MR. BRODSKY: So first I think it's important to point,
21 Mr. Trump's counsel's comments about some of the requests in
22 context and demonstrate why his justifications for wanting to keep
23 them private ring hollow.

24 We didn't ask for, you know, e-mails or text messages
25 between Melania Trump and Donald Trump or about Stormy Daniels out

1 of some purulent curiosity. Mr. Trump alleged in his suit that
2 the reason why he made the hush money payment to Stormy Daniels
3 was to protect his family. Okay? We're -- that's at issue in the
4 case. I mean, we're not randomly assailing him. He's laid out,
5 you know, his history with Mr. Cohen in a publicly filed document.

6 And there is, of course, a looming question about waiver
7 here because, of course, when you voluntarily put something out
8 into the public domain, your privilege is deemed to have
9 disappeared for better or worse.

10 As to the point that the Court made about sort of the
11 confidentiality order swallowing the case, which I think is a real
12 concern here, you can see, Your Honor, in -- and anybody can --
13 I'll just give you an example.

14 In paragraphs 83 and 84 -- it's not that many specific
15 items about matters at hand for Mr. Trump that he actually alleges
16 were disclosed. But the ones that he does allege, one of the
17 primary ones is this issue about a rogue board at Trump World
18 Tower and how Mr. Cohen was assisting Mr. Trump with that. If you
19 go on to Google and search Trump World Tower Michael Cohen, there
20 are many, many articles from long before their relationship
21 fractured about Michael Cohen's involvement in Trump World Tower
22 and that issue.

23 This was not -- you know, none of these items are secret
24 hidden matters that Mr. Cohen handled for Mr. Trump. Everything
25 with Mr. Trump is in the bright glare of the public eye, often

1 intentionally. He -- he does that. That's what he wants. And so
2 it's somewhat hard to reconcile what is an undeniable
3 attention-seeking behavior and sort of freewheeling nature of his
4 private affairs, and now has claimed after he went into court and
5 raised all these things saying: Well, now it all has to be
6 private. It's particularly hard to reconcile because, for
7 example, Mr. Cohen wrote the book, which is -- Mr. Trump is not
8 suing on, in 2020, okay. This wasn't: Oh, Michael Cohen's gone
9 rogue. We've got to rush into court. Okay? He waited a long
10 time with all those -- that information swirling out there. Not
11 coincidentally, immediately after it was disclosed that Mr. Cohen
12 had testified before the grand jury in that case in Manhattan
13 before the DA, Mr. Trump filed this suit. Draw the conclusion
14 from that which you may. It's -- you're right: This is not your
15 average case, and it's not your average litigant's request to keep
16 the private -- to keep their affairs private.

17 We would suggest, Your Honor, the appropriate way to do
18 this is if there is something that Mr. Trump is going to produce
19 and he believes is so private that it cannot be added to the
20 mountain of information about him, then it's incumbent on him to
21 move for protection. It's incumbent on him to move for
22 protection.

23 And we'll request from you -- from you, Judge, after we
24 deal with this issue that Mr. Brito promptly provide dates for his
25 client's deposition. We provided materials showing we've been

1 asking for those dates for quite some time. Once the Court enters
2 whatever order it deems appropriate, we'll get dates for Mr.
3 Trump. And I wouldn't object, Judge, that there will be a certain
4 period of time, for example, after Mr. Trump's deposition, where
5 that will remain private presumptively and then it won't be. And
6 Mr. Brito can come to the Court and say: This has to be private,
7 this has to be private, this has to be private, and we'll abide by
8 that and not -- we would never violate the Court's orders, but
9 that's the right way to do it here. The burden is on Mr. Trump.

10 THE COURT: And with respect to -- with respect to my
11 point on something where he is declaring it to be privileged, that
12 some document -- I suppose there could also be testimony, but to
13 make it easier, for a document that he's declaring was privileged
14 and the privilege remains intact, meaning he hasn't waived it,
15 right, how do I deal with that?

16 Why can't -- we'll just take that as an easier
17 subcategory of document, right? His argument is that the whole
18 reason that he filed this lawsuit is because he believes that his
19 ethical -- ethical obligations owed to him by Mr. Cohen have been
20 violated and he's now seeking recompense. So to the extent that
21 there is a document production that involves attorney-client
22 communications at the time, right, at least as to those category
23 of documents, why couldn't those category of documents be
24 presumptively privileged upon his request; and putting that
25 category of documents at least in a presumptive privilege that you

1 would then have to overcome, as is tradition?

2 MR. BRODSKY: Well, query whether producing documents to
3 the opposing side maintains the privilege. He could lob
4 documents, I suppose, on matters that he claims are privileged
5 and, for example, irrelevant to the case.

6 THE COURT: That's a good question. Would you actually
7 ask him to produce privileged documents? Because you may want to
8 ask him to produce documents that are not in the public domain
9 that Mr. Cohen knows exists because he was -- he was privy to them
10 during the relevant period, and in the public world they're
11 privileged, right, but you may -- you may include it in a document
12 request because you think it helps your defense.

13 As to that category, to make it easier, why wouldn't he
14 be entitled to have a presumptive privilege protection on that
15 category?

16 MR. BRODSKY: Well, I don't think he would have a
17 privilege because he's disclosing it to his adversary, right,
18 that's going to be used in a public proceeding and it's not
19 privileged once it's turned over, so that sort of evaporates;
20 right? Once it's turned over, I suppose he may lob documents and
21 say: These are with my other counsel. This doesn't have to do
22 with you. You weren't privy to it. I'm not relying on this in my
23 case or whatever, I don't know what they're going to do.

24 THE COURT: Uh-huh.

25 MR. BRODSKY: But any documents that are relevant to this

1 case have to be turned over and relevant to our defenses; and,
2 therefore, they are not privileged. That's the cost --

3 THE COURT: I'm not so sure I agree with that. In other
4 words, what you're saying is if I, the defendant, deem a -- an
5 otherwise privileged document to be relevant in my defense, and I
6 request it under the Court's rules, if the plaintiff complies with
7 the request -- right -- even if by putting privileged on it, let's
8 assume that. In other words, the act of production itself in
9 response to your request would be a waiver of the privilege; is
10 that what you're saying?

11 MR. BRODSKY: I -- I don't see how it could be otherwise.
12 At that point let's imagine there was an ironclad confidentiality;
13 we couldn't share it, but we use it in our defense, you know,
14 there wouldn't be a silo, you know, there wouldn't be a glass
15 bubble over that category of documents that would be the subject
16 of public proceedings motions, for summary judgment, trial, et
17 cetera.

18 THE COURT: Right.

19 MR. BRODSKY: But I think that the privilege is waived.
20 I think that's, you know, in a malpractice -- in attorney
21 malpractice claims, that happens all the time, you know. The --
22 the plaintiff comes in and says: You committed malpractice
23 against me because you didn't check the box, you checked the wrong
24 box, okay. The lawyer says: Well, okay. Send over all your
25 communications to me. We're adverse now. You know, the privilege

1 doesn't apply anymore; you've put it at issue. It's a sword and a
2 shield question. So, you know --

3 THE COURT: Assuming it's produced in your example --
4 that's a good example -- in your example the fact that the client
5 produces it to the lawyer is deemed a waiver of the privilege?
6 Not necessarily using at trial, because obviously that's more of a
7 public -- a public disclosure; right?

8 But simply the act of producing it in -- in a -- I've
9 never handled a legal malpractice case -- is that deemed to be a
10 privilege waiver?

11 MR. BRODSKY: Yes. I mean, I see it, Mr. Eichenblatt
12 sees it. All these people are outside of the attorney-client
13 relationship, you know. The cover has been blown.

14 THE COURT: Right. So then what prevents the client in
15 that from saying: Well, I'm not giving it to you until I -- until
16 trial, because I don't know if I want to waive the privilege to it
17 until the end of the case?

18 MR. BRODSKY: Well, then that -- well, then you have an
19 issue that you have complying with turning over responsive
20 documents that you're relying on for your case, and you're not
21 complying with your discovery obligations.

22 But there is a cost --

23 THE COURT: But in that who wins? Who wins that battle?

24 MR. BRODSKY: That's the cost of the plaintiff coming
25 into court and suing his or her attorney. I mean, that's the

tradeoff.

THE COURT: Is that right? Do you do legal malpractice?

MR. BRITO: I don't, but I know from having seen the case law on this -- first of all, this is not a legal malpractice case. That is a distinction with respect to the conversation that we're having.

THE COURT: But isn't it really?

MR. BRITO: We just briefed this, Judge.

THE COURT: But it's a breach of fiduciary claim.

MR. BRITO: Based upon disclosure of information as opposed to negligence; that's the distinction.

THE COURT: Right.

MR. BRITO: And the case law is different as it relates to a malpractice case.

THE COURT: On this issue?

MR. BRITO: It is. And this is a disclosure of information, a breach of the confidence, as opposed to failure to perform your duties to the level -- the applicable standard and so forth with regard to a negligence claim, which would be the thrust of a malpractice case.

But in the scenario made by Mr. Brodsky for the defendant, it's: Heads, you win. Tails, you lose because now the plaintiff has to comply with a request that's been made to them that would otherwise require them to divulge a privileged document that they don't want to have produced.

01:41PM 1 There is -- it's a forced waiver of privilege, which that
01:41PM 2 is inconsistent with the principles of waiver. It has to be a
01:41PM 3 knowing and voluntary relinquishment of a right. You can't force
01:41PM 4 a party to waive their privilege --

01:41PM 5 THE COURT: Right.

01:41PM 6 MR. BRITO: -- simply because you're in dispute. And
01:41PM 7 again, context matters. We're talking about an unauthorized
01:41PM 8 disclosure of privileged information by the attorney, and now the
01:41PM 9 attorney wants to come back and say: Well, give me more so that I
01:41PM 10 can disclose more. And what you give me now is -- is for public
01:41PM 11 consumption.

01:41PM 12 The privilege is lost. Forget confidentiality.
01:41PM 13 Privilege is lost as to that issue. That's -- that's not the law,
01:41PM 14 Judge. I don't do malpractice cases, but that's clearly not the
01:41PM 15 law.

01:41PM 16 MR. BRODSKY: So I would point the Court to the Savino
01:41PM 17 case, which is a Florida Supreme Court case, which is the
01:42PM 18 granddaddy case about the at issue waiver when a client sues his
01:42PM 19 or her attorney. And the district courts of appeal in Florida
01:42PM 20 have, you know, varying ways that they express that. But the
01:42PM 21 general notion is that when there's some affirmative act by the
01:42PM 22 plaintiff here that puts protected information at issue, and
01:42PM 23 asserting the privilege over that would prejudice our rights.

01:42PM 24 The privilege is waived. I mean that -- and I'm -- I --
01:42PM 25 listen, I -- I will leave it to the Court, but that's my

1 understanding. Otherwise, you know, it's a sword and shield that
2 were at issue, or any number of ways you can articulate it. That,
3 you know, by saying: You gave me bad advice, or: I gave you
4 advice, and then you improperly disclosed it and it was
5 confidential, part of this case is going to be saying: Well, who
6 -- who else knew about this? Okay.

7 You -- you say that we improperly discussed the fact that
8 we worked -- we did work in the Trump World condo and that was top
9 secret and nobody knew about it. I mean, we're going to get and
10 we're entitled to get all of the communications Mr. Trump has had
11 with others about that.

12 THE COURT: Yeah, but that would not be privileged
13 though. That would be different; right? If he communicated the
14 facts to, I don't know, whoever works for him who is not a lawyer,
15 right, then there would be no privilege to that.

16 MR. BRODSKY: Well, for example, if there are
17 communications --

18 It wouldn't necessarily be privileged if -- if it later
19 it became public knowledge, the subject matter. I could think of
20 a situation where Mr. Trump says: Well, I talked to Johnny Jones
21 about the Trump World Tower, and he thinks I should do this. What
22 do you think I should do? Okay? Well: I told Johnny Jones, you
23 know, there's going to be a fight over -- I -- I can't imagine
24 there would be a fight over the privilege of that document because
25 it goes squarely to Mr. Trump's claims, but what are we going to

01:44PM 1 do? I mean, he's going to say we can't get his -- we can't use
01:44PM 2 his privileged information, you know, his communications with us
01:44PM 3 in defending ourselves, what is our defense going to be?

01:44PM 4 THE COURT: Well, I guess my question though is --
01:44PM 5 without getting too far afield -- but on this point maybe it is a
01:44PM 6 waiver if ultimately the case goes to trial; and at that point you
01:44PM 7 have to decide: Do I want to press my case or not?

01:44PM 8 But in the course of discovery there may be a period
01:44PM 9 where the fact that I had to turn it over to my former client --
01:44PM 10 lawyer, in and of itself was not deemed privileged unless I
01:44PM 11 affirmatively then decide that I want to either, A, use it, or, B,
01:45PM 12 proceed with the litigation, because the Court will deem it a
01:45PM 13 waiver if I don't allow the defendant to use it.

01:45PM 14 MR. BRODSKY: I would -- I would suggest to the Court
01:45PM 15 that the, you know, that there is a -- there has been a waiver.
01:45PM 16 That doesn't mean if there's no further waiver, that would happen.
01:45PM 17 But putting that to one side, again --

01:45PM 18 THE COURT: Uh-huh.

01:45PM 19 MR. BRODSKY: -- I think the appropriate thing to do
01:45PM 20 would be if Mr. Brito believes there are, for example, privileged
01:45PM 21 communications that are still privileged --

01:45PM 22 THE COURT: Right.

01:45PM 23 MR. BRODSKY: -- and are the subject matter of
01:45PM 24 confidentiality, then but put the burden on him to come before the
01:45PM 25 Court.

01:45PM 1 I -- I don't want to have every single document produced
01:45PM 2 be marked confidential. I don't think that's fair or appropriate
01:45PM 3 either. I don't think Mr. Trump's shown good cause.

01:45PM 4 And the same thing goes for testimony. You know, there's
01:46PM 5 going to be a lot of stuff that we can justifiably ask him that's
01:46PM 6 not going to have to do with any conversation he had with Mr.
01:46PM 7 Cohen.

01:46PM 8 THE COURT: Right.

01:46PM 9 MR. BRODSKY: And those -- you know, that's fair game.
01:46PM 10 So that's why I would -- you know, I agree with the Court that the
01:46PM 11 burden's on him, and let him come before the Court and -- and show
01:46PM 12 why. And if it -- it will become apparent if Mr. Trump's trying
01:46PM 13 to abuse that by turning things that are not, in fact, within
01:46PM 14 that, you know, narrow universe into something greater, but the
01:46PM 15 burden should be on him.

01:46PM 16 THE COURT: Now, I guess -- let me broaden the
01:46PM 17 discussion, because I know -- I know you had raised just now --
01:46PM 18 you had raised just now the question of other discovery that you
01:46PM 19 intended to produce to proceed with.

01:46PM 20 Are you going to wait for the completion of discovery to
01:46PM 21 take his deposition, for example?

01:46PM 22 MR. BRODSKY: No.

01:46PM 23 THE COURT: Okay. So then you're going to want his
01:46PM 24 deposition sooner rather than later?

01:47PM 25 MR. BRODSKY: Yes, Your Honor.

01:47PM 1 THE COURT: Okay. And then with respect to -- obviously,
01:47PM 2 we'll -- the production we'll have to deal with when we deal with
01:47PM 3 it.

01:47PM 4 But with respect to this issue, ordinarily, of course,
01:47PM 5 there's agreement between the parties to do a confidentiality
01:47PM 6 order, because it's in the plaintiff's interest to get the
01:47PM 7 defendant to move. Here it's a different scenario. We have one
01:47PM 8 party who opposes the entirety. And, alternatively if the Court
01:47PM 9 -- says to the Court: If you're going to enter one, it should be
01:47PM 10 very narrow. Right? And then another party, the plaintiff, who
01:47PM 11 wants a more broader kind of confidentiality agreement.

01:47PM 12 So, number one, I guess to some extent I don't think I've
01:47PM 13 dealt with that unique situation, so I may want to have -- you've
01:47PM 14 probably done the research on this. Can you put together
01:47PM 15 something pretty quickly on your end?

01:47PM 16 MR. BRITO: We can submit a brief. On these legal
01:47PM 17 issues, Your Honor?

01:47PM 18 THE COURT: Yes.

01:47PM 19 MR. BRITO: Sure.

01:48PM 20 THE COURT: So just to make life more efficient, you want
01:48PM 21 to just wait for his brief and then file seven days later?

01:48PM 22 MR. BRITO: Please.

01:48PM 23 THE COURT: Does that work?

01:48PM 24 MR. BRITO: Please.

01:48PM 25 THE COURT: Why don't we do that. And then for now, I

01:48PM 1 take it there is no immediate production, like, next week ready to
01:48PM 2 go out; right? You're still haggling through the what's going to
01:48PM 3 be the scope?

01:48PM 4 MR. BRITO: This is -- well, this is really the first --

01:48PM 5 THE COURT: Right.

01:48PM 6 MR. BRITO: -- (unintelligible) to be clear --

01:48PM 7 THE COURT: Right.

01:48PM 8 MR. BRITO: -- because our position was we are not
01:48PM 9 comfortable producing any documents and/or allowing Mr. Trump to
01:48PM 10 sit for a deposition until this confidentiality issue is resolved.

01:48PM 11 THE COURT: Right.

01:48PM 12 MR. BRITO: And then separate and apart from that, yes,
01:48PM 13 there's going to be a request-by-request analysis as to -- which
01:48PM 14 we've already engaged in and we have responded, we had a meet and
01:48PM 15 confer with.

01:48PM 16 THE COURT: Right.

01:48PM 17 MR. BRITO: But this is really the first hurdle.

01:48PM 18 THE COURT: Right. So -- so I guess to some extent, I
01:48PM 19 will resolve the confidentiality order as quickly as I can to move
01:48PM 20 things forward. And then, you know, if they want to take his
01:49PM 21 deposition sooner rather than later, then you'll just produce him
01:49PM 22 sooner rather than later.

01:49PM 23 And then for -- for -- don't let this issue be a delay.
01:49PM 24 At this point I'll temporarily issue on the transcript of any
01:49PM 25 deposition a protective order until I finalize my work on this

1 request. So that way to the extent that --

2 In other words, don't let this be the reason to not take
3 a deposition you otherwise would be agreeable to take. Does that
4 make sense?

5 MR. BRITO: The transcript and the video?

6 THE COURT: Yes.

7 MR. BRITO: I just want to be clear.

8 THE COURT: Right. Because obviously there's no time
9 restriction on that. Because if you agree -- my point to you is
10 if you all agree he has a slot of time to get deposed in two
11 weeks, I may not be done with this in two weeks, but go forward,
12 because I'll enter an oral protective order that until I finalize
13 this, we'll keep things -- everything cannot be disclosed until
14 I -- until the parameters have been set forth in the final order.

15 MR. BRITO: Understood, Your Honor. If I could just
16 leave you with one final thing?

17 THE COURT: And obviously on the docket, you all are
18 working together, and at some point you're going to have to have
19 judicial intervention on the scope of discovery.

20 MR. BRODSKY: That's what I was going to ask, Your Honor,
21 if we could get time from, you know, now.

22 THE COURT: Yes.

23 MR. BRODSKY: We would like to set that. I think we've
24 sort of reached an impasse.

25 THE COURT: Oh, okay. Why don't we do that?

MR. BRODSKY: Yeah, that would be great.

THE COURT: Because you know you're going to have at least one issue in this case.

MR. BRITO: Judge, I didn't bring my phone with me. I left it in my car today. I just don't want to commit to a date without looking at my calendar, but I can let counsel know.

THE COURT: Sure.

MR. BRODSKY: Well, yeah. I mean, I guess --

THE COURT: It won't be tomorrow, so don't worry about it. Hold on. I just had a span of time open up. August 17th has opened up. I was going to have something that week. So August 17th presumptively. Why don't we do 9:30? Maedon will remind me of the time, and then -- and then I'll give you a couple hours, and hopefully we can hash out anything you all can't agree upon at that point.

MR. BRITO: Can I communicate back to counsel today --

THE COURT: Right.

MR. BRITO: -- when I get back to my office?

THE COURT: Sure. We'll go ahead and pencil that in. If you tell us otherwise, then give me a proposed alternative; but that time period has opened up.

MR. BRITO: Okay.

MR. BRODSKY: The other thing we would ask, Judge, you order the plaintiff to give dates here now, because we don't want to wait to then have another hearing to ask for dates. So that

01:52PM 1 was part of why we included those materials: We would like some
01:52PM 2 deadline by which the plaintiff is required to give dates.

01:52PM 3 THE COURT: Well, rather than that: When do you want to
01:52PM 4 depose him?

01:52PM 5 MR. BRODSKY: When he's available. I'm guessing the
01:52PM 6 problem is not going to be my schedule, but --

01:52PM 7 THE COURT: If you're willing to accommodate his
01:52PM 8 schedule: In the next few weeks I can take it?

01:52PM 9 MR. BRITO: It would be impossible for me to give him a
01:52PM 10 date right now.

01:52PM 11 MR. BRODSKY: That's what I'm saying.

01:52PM 12 THE COURT: I'm not going to force you to, but if he
01:52PM 13 wants to take the deposition sooner rather than later, our
01:53PM 14 discovery cutoff in the case is not till February.

01:53PM 15 So how about three proposed dates within the next
01:53PM 16 45 days? How's that?

01:53PM 17 MR. BRODSKY: Perfect. Thank you.

01:53PM 18 THE COURT: Okay. So three proposed dates for him to
01:53PM 19 take the deposition within the next 45 days.

01:53PM 20 MR. BRODSKY: The dates -- the deposition needs to occur
01:53PM 21 within the next 45 days?

01:53PM 22 THE COURT: Correct.

01:53PM 23 MR. BRODSKY: Yeah. Thank you.

01:53PM 24 THE COURT: Because you told me you didn't want to wait
01:53PM 25 for the production.

01:53PM 1 MR. BRODSKY: No, we're ready.

01:53PM 2 THE COURT: So three proposed dates within the next
01:53PM 3 45 days. Okay? Communicate that to him. Obviously, if there's
01:53PM 4 still disagreement, I can resolve it on the 17th; but then
01:53PM 5 hopefully we won't need to do that. But hopefully by the 17th
01:53PM 6 I'll have --

01:53PM 7 You know, you're going to file something next week --
01:53PM 8 today's Thursday -- by Wednesday?

01:53PM 9 MR. BRODSKY: Yes.

01:53PM 10 THE COURT: Make it short.

01:53PM 11 MR. BRODSKY: Wednesday is fine.

01:53PM 12 THE COURT: Yes, make it short because it's a
01:53PM 13 straightforward issue. The issue you're raising is: Is there
01:53PM 14 really good cause to enter any protective order in this case
01:54PM 15 because of the nature of the case? And your opposition, you're
01:54PM 16 opposed to it, that's unique. And then you can respond seven days
01:54PM 17 after he files his.

01:54PM 18 So that takes us then into the week of July 31. Say so
01:54PM 19 hopefully by August 11th I'll be done with that order; and then so
01:54PM 20 by the time that we get to the -- to that hearing on the 17th, if
01:54PM 21 that works, you'll have that in place, and you'll have that in
01:54PM 22 place for purposes of --

01:54PM 23 Chances are the deposition will be sometime in around
01:54PM 24 then.

01:54PM 25 MR. BRODSKY: The last point I'd like to raise, Your

01:54PM 1 Honor, is sort of the temporary or provisional protective order
01:54PM 2 applies to documents as well?

01:54PM 3 THE COURT: Yes. Although, when is your first production
01:54PM 4 going out as a practical matter?

01:54PM 5 MR. BRITO: Probably sometime next week I would say.

01:54PM 6 THE COURT: Okay.

01:54PM 7 MR. BRODSKY: There's one document particularly we would
01:54PM 8 like before President Trump's deposition, and that's the
01:54PM 9 agreement; that's the purported confidentiality agreement.

01:54PM 10 THE COURT: So you do want to wait for that?

01:55PM 11 MR. BRODSKY: Well, just -- Mr. Brito says he has it.
01:55PM 12 We'll agree that it will be subject to confidentiality; so if we
01:55PM 13 could have an order that that has to be turned over, you know, in
01:55PM 14 a week?

01:55PM 15 THE COURT: Does that make it easier for you then?

01:55PM 16 MR. BRITO: You don't need an order. I'm agreeing to it,
01:55PM 17 Judge.

01:55PM 18 THE COURT: And then I'll -- I'll -- everything until I
01:55PM 19 enter a final order is presumptively confidential. How's that?

01:55PM 20 MR. BRODSKY: Great.

01:55PM 21 THE COURT: So that way you won't have that problem.

01:55PM 22 MR. BRODSKY: Thank you.

01:55PM 23 THE COURT: And you can rely on that.

01:55PM 24 MR. BRODSKY: Thank you.

01:55PM 25 MR. BRITO: Your Honor, I just wanted to leave you with

one final thing, just in relation to the -- one of the last arguments that was raised by counsel is the uniqueness of this privilege issue and the disclosure, the voluntary disclosure.

THE COURT: Right.

MR. BRITO: And the best way for me to provide the Court (unintelligible) is a dispute between employer and employee, where the employee reveals trade secret information to someone else.

To the extent that the employer seeks to sue the employee for doing that and the employee says: Well, let's engage in discovery. Send me the documents that -- that relate to the actual trade secret information that I provided; not the totality of your business, but I gave a particular component of a trade secret, I disclosed that to your competitor, and then at that point the employer is going to ask the employer: Give me everything that would fall within the trade secrets, and that no longer is marked as confidential or proprietary or no longer bears the designation of being a trade secret because you disclosed it to me in discovery.

THE COURT: Right.

MR. BRITO: And that's clearly not the case.

THE COURT: You're probably right. But what was the name of that case? Sariano? Soriano?

MR. BRODSKY: The Florida Supreme Court case from which the district courts is Savino vs. Luciano, 92 Southern 2d, 817.

And then there are First DCA cases, including the First

01:57PM 1 Southern case. 610 Southern 2d, 454, is the point cite.

01:57PM 2 The Third District's case is the Tenet Healthcare case,
01:57PM 3 761 Southern 2d, 1140.

01:57PM 4 So there -- my source may be a bit dated, but that will
01:58PM 5 at least give the Court kind of the initial lead on the cases
01:58PM 6 about malpractice and the waiver of privilege.

01:58PM 7 MR. BRITO: And that's the distinction that I brought up
01:58PM 8 to the Court. This is not a malpractice case; it is viewed
01:58PM 9 differently in federal court.

01:59PM 10 THE COURT: This is the holding in the case: When a
01:59PM 11 party has filed a claim based upon a matter of ordinary privilege,
01:59PM 12 the proof of which will necessarily require that the privileged
01:59PM 13 matters be offered in evidence, we think that he has waived his
01:59PM 14 right to insist that pretrial discovery in the matter is
01:59PM 15 privileged. The defendant has either expressly or impliedly
01:59PM 16 waived the right to insist upon the privileged nature of the audit
01:59PM 17 and report.

01:59PM 18 I guess that's the operative language; isn't it? Is a
01:59PM 19 given document that you're requesting of the plaintiff one which
02:00PM 20 will necessarily require him to use; right?

02:00PM 21 MR. BRODSKY: If he's going to say that he told this
02:00PM 22 privileged confidence that we then disclosed, the first part of
02:00PM 23 the part of that proof is: I told you a privileged confidence.
02:00PM 24 That goes into evidence necessarily? How is he going to --

02:00PM 25 THE COURT: I guess it depends though; right? It

1 depends. In other words, we're not going to be able to answer it
2 now obviously, but it depends, I guess, is my reading of it. But
3 again, I -- we'll take it a step at a time.

4 If you want to include any of that, by the way, because
5 what I'm envisioning -- I might as well tell you now so you can
6 think about it -- is at the very least granting your motion for a
7 protective order with respect to at minimum a privileged thing
8 that you deem to be attorney-client privilege would then be
9 presumptively confidential.

10 And then even if you're right that that there may be a
11 waiver there, the timing of that waiver may be -- may be -- could
12 be put off, right, in other words? But for purposes of disclosing
13 it, if he deems something to be attorney-client privilege, I think
14 that should be presumptively not disclosable. And then we can
15 argue it later, but presumptively not disclosable.

16 That would be one category of protection which goes to
17 your point.

18 MR. BRITO: Discovery versus trial disclosure?

19 THE COURT: Right. But then you have the broader -- I
20 think that's easy; although, this little wrinkle of whether that's
21 a waiver or not is something you need to consider. He's luring
22 you into something, so you have to do this research to make sure
23 he's wrong.

24 MR. BRODSKY: Or right.

25 THE COURT: Or right. Whatever, either way. Because

02:02PM 1 obviously you don't want to -- you don't want to -- you don't want
02:02PM 2 to screw that up, right, in other words? But -- so that I think
02:02PM 3 is easy.

02:02PM 4 What's really hard though in this case is anything that
02:02PM 5 goes beyond the scope of attorney-client privilege and you're just
02:02PM 6 dealing with documents that are confidential in a very public
02:02PM 7 case, well, at that point then, at the very least, the presumption
02:02PM 8 of confidentiality may have to be switched, and I may have to have
02:02PM 9 you assert and convince me why this particular document should not
02:02PM 10 be disclosed.

02:02PM 11 That way that -- that gives you a filter. You're not
02:02PM 12 going to be -- if I do that, and I think I can, then as the
02:02PM 13 plaintiff you're going to recognize that you're then not going to,
02:02PM 14 as a practical matter, be able to do that for everything that gets
02:02PM 15 produced. You're only going to do that for that -- for something
02:02PM 16 that you think really matters, right, and it would really injure
02:02PM 17 the plaintiff, who is a very public figure; right?

02:03PM 18 I think that may be a solution; to grant you relief under
02:03PM 19 a nontraditional -- in a nontraditional case.

02:03PM 20 MR. BRITO: And so to follow up on that, and just to kind
02:03PM 21 of put it in my own words, to the extent that there's two buckets
02:03PM 22 of documents, (unintelligible) nonconfidential, which is the
02:03PM 23 easiest, but then the privileged documents, which I would not
02:03PM 24 produce and I would just make the subject of a privilege log.

02:03PM 25 THE COURT: That's true. He's basically saying maybe

02:03PM 1 that's -- that's the first thing you should do.

02:03PM 2 MR. BRITO: Unless and until I -- if -- if I elect that I
02:03PM 3 need to use any of those documents --

02:03PM 4 THE COURT: Right.

02:03PM 5 MR. BRITO: -- in the case, and then we've got to wrestle
02:03PM 6 with what Mr. Brodsky brought up --

02:03PM 7 THE COURT: Right.

02:03PM 8 MR. BRITO: -- with regard to whether or not I'm making
02:03PM 9 that document unprivileged by its use.

02:03PM 10 THE COURT: Right.

02:03PM 11 MR. BRITO: And in the third bucket --

02:03PM 12 THE COURT: Well, that's clearly true; right? If you
02:03PM 13 need to use it, right, if you need to use it, then you're going to
02:03PM 14 have to make that call.

02:03PM 15 MR. BRITO: Right. And then -- and the third component
02:03PM 16 is the confidential documents, which we'll just have to deal with.
02:03PM 17 And I -- and I'm requesting be continued to be covered under
02:04PM 18 confidentiality. I think what Your Honor is (unintelligible) is:
02:04PM 19 Fine. But if it's challenged, then I'm going to look to you, Mr.
02:04PM 20 Brito, to explain to me why it is that it bears that designation.

02:04PM 21 THE COURT: No. What I'm saying is you're the one that
02:04PM 22 needs to challenge it. You're the one that needs to raise it;
02:04PM 23 because ordinarily it's presumptively confidential. Simply by you
02:04PM 24 marking it confidential in a traditional agreement, all right, you
02:04PM 25 mark it confidential, that that puts the burden on the the

1 receiving party to affirmatively seek relief; right?

2 MR. BRITO: I'm not disagreeing with you. What I'm
3 saying --

4 THE COURT: Here it's presumptively, one, nothing would
5 be presumptively confidential other than privilege; right? And
6 then -- unless you then seek relief to make it confidential.
7 Okay?

8 MR. BRITO: I guess we're saying the same thing two
9 different ways.

10 THE COURT: It's a burden in your case though.

11 MR. BRITO: I agree with the burden, but I think
12 mechanically I wasn't assuming there was a presumption. But if I
13 designate a document as confidential, the -- the defendant has the
14 right to question my designation -- just to question my
15 designation anything (unintelligible), then I bear the burden to
16 come to you and explain why I designated it as confidential --

17 THE COURT: Oh, I see, yes.

18 MR. BRITO: -- because in the interim --

19 THE COURT: Right.

20 MR. BRITO: -- in the interim there's going to be another
21 dispute as to: Well, produce that document. And it's now -- it's
22 not confidential. I eventually come before the Court and I
23 convince you that it is, that's too late.

24 I think the process is it's confidential, I'm still
25 producing it to the other side under confidentiality, they

question my designation on a document-by-document basis, then I have the to bear the burden that that designation is appropriate and it should be maintained. If it is, it stays and it's confidential; if it's not, then it's not.

THE COURT: So it's not a cat out of the bag kind of thing?

MR. BRITO: Correct. That's the mechanics that I was kind of going through in my head.

THE COURT: All right. Okay. Well, that's kind of what I'm thinking. But again, I'm not going to make -- I'm going to consider what --

Because his argument is there shouldn't be one at all. I agree only that that's viable. That's a viable argument here, except for attorney-client privilege documents because just because he's a public figure, that doesn't mean he's not entitled to privilege; right? And so that's a different animal. That's one bucket, as you point out.

It's on the nonprivilege documents that you believe are confidential is what we're really going to have a fight. His argument is unless it's privileged, there is no confidentiality; right? I can do whatever I want with it, and it's out there.

Your argument: It should be protected.

MR. BRITO: Correct.

THE COURT: So his argument is: There's no good cause to do that. And so that -- that I need to resolve in that order.

02:06PM 1 Okay?

02:06PM 2 MR. BRODSKY: Thank you, Judge.

02:06PM 3 THE COURT: All right. Thank you.

02:06PM 4 MR. BRITO: Thank you for your time, Your Honor.

02:07PM 5 THE COURTROOM DEPUTY: All rise. Court's now adjourned.

02:07PM 6 THE COURT: So we agreed August 17th, unless --

02:07PM 7 MR. BRITO: Unless --

02:07PM 8 THE COURT: We'll pencil it in.

9 (Proceedings concluded.)

10 C E R T I F I C A T E

11 I certify that the foregoing is a correct transcript from the
12 digital audio recording of proceedings in the above-entitled
13 matter.

14
15 Dated: 8/19/23

s/Vernita Allen-Williams, RMR, FCRR